STATE OF MICHIGAN

COURT OF APPEALS

GEORGE KUPEL and MARIANNE KUPEL, Plaintiffs-Appellants,[1]	UNPUBLISHED June 17, 2003
v	No. 236781 Macomb Circuit Court
GENERAL MOTORS and MARY ANN HERGT, Defendants-Appellees.[2]	LC No. 00-002789-CZ

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an opinion and order granting defendant General Motors' motion for summary disposition on plaintiff's claims of reverse racial discrimination, retaliation, and a hostile work environment under the Michigan Civil Rights Act, MCL 37.2202 *et seq*. We affirm.

I. Facts

The facts and circumstances of this case pertain to employment relationships and working conditions at a General Motors (GM) facility. Plaintiffs George and Marianne Kupel are caucasian of east European descent and have worked at GM in janitorial services for 36 years and 29 years, respectively. In essence, plaintiffs assert that agents of former co-defendant Knight Facilities Management-GM, Inc. (a subcontractor of General Motors), a minority-owned and operated company, mistreated white employees such as plaintiffs because of their race.

GM contracted out certain supervisory responsibility of its janitorial services to Knight Facilities. Plaintiffs contend they were treated poorly on the job, assigned different and more difficult tasks than other co-workers, were unfairly disciplined and were victims of a false rumor that plaintiffs were circulating a petition alleging racial discrimination by a supervisor.

On July 31, 2001, the trial court granted defendants' motion for summary disposition. The trial court's opinion stated that: a defendant supervisor's remark about "foreigners" was directed toward a third party and was not directed to plaintiff Marianne Kupel; plaintiff Marianne

[1] Plaintiff, Helena Nawrat, settled during case evaluation.

[2] Defendants, Knight Facilities Management-GM, Inc., Liz Howard, Yvonne Wells and Robin Roberts, settled during case evaluation.

Kupel admitted that no co-worker made derogatory comments concerning plaintiffs' national origin; plaintiff George Kupel's failure to contact security after an isolated comment about "watch your back" was indicative that he did not fear for his physical safety; disciplining plaintiff George Kupel was not retaliatory in nature and he received lost compensation; and, plaintiff failed to establish grounds tantamount to a reverse discrimination claim.

II. Standard of Review

A trial court's grant or denial of a motion for summary disposition is reviewed de novo on appeal. *Spiek v DOT*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id*. Summary disposition is properly granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, deposition, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

III. Analysis

A. Reverse Discrimination Claim Pursuant to the Michigan Civil Rights Act

Under the Michigan Civil Rights Act, an employer may not discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment because of religion, race, color, national origin, age, sex, height, weight or marital status. MCL 37.2202(1)(a); *Wilcoxon v 3M*, 235 Mich App 347, 358; 597 NW2d 250 (1999).

A plaintiff may establish a claim that his employer discriminated against him in violation of the Civil Rights Act by the presentation of direct or indirect evidence, or by the presentation of a prima facie claim. *Wilcoxon, supra*, 235 Mich App 358-359. In order to establish a prima facie claim of employment discrimination, a plaintiff must show that he or she suffered an adverse employment action under circumstances which give rise to an inference of discrimination. *Wilcoxon, supra*, 235 Mich App 361. A plaintiff must show that: (1) he or she was a member of a protected class; (2) he or she was subject to an adverse employment action; (3) he or she was qualified for the position; and (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Smith v Goodwill Indus of W Mich, Inc*, 243 Mich App 438, 447-448; 622 NW2d 337 (2000). If a prima facie claim is established, the employer then bears the burden of showing a legitimate, nondiscriminatory reason for the adverse employment action. *Wilcoxon, supra*, 235 Mich App 361. If the employer does so, the plaintiff has the burden to prove that the stated reason was merely pretextual. *Id*.

A reverse discrimination plaintiff who has no direct evidence of discriminatory intent may establish a prima facie claim of discrimination by showing background circumstances supporting the suspicion that defendant is that unusual employer who discriminates against the majority. *Allen v Comprehensive Health Servs*, 222 Mich App 426, 433; 564 NW2d 914 (1997). But see *Venable v General Motors*, 253 Mich App 473, 480; 656 NW2d 188 (2002) (a plurality

opinion rejecting the requirement that the plaintiff present in a reverse discrimination lawsuit evidence that the defendant is the rare employer who discriminates against the majority).

For an employment action to be an adverse employment action, the action must have been materially adverse in that it involved more than inconvenience or an alteration of job responsibilities, and there must have been some objective basis for demonstrating that the change was adverse. *Wilcoxon, supra,* 235 Mich App 362-363.

Here, plaintiffs have failed to establish a reverse discrimination claim. The trial court noted that a statement allegedly made by a supervisor of plaintiffs, that she "did not like foreigners because they come to this country and get everything," was an isolated, stray remark. In determining the admissibility of a stray remark, a court must consider whether the remark: (1) was made by a decision maker or by a person uninvolved in the challenged decision; (2) was isolated or part of a pattern of biased comments; (3) was made near or remote in time to the challenged decision; and (4) was ambiguous or clearly reflected discriminatory bias. *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 297; 624 NW2d 212 (2001). Here, plaintiff Marianne Kupel acknowledged that this comment was not directed to her and was allegedly made when the supervisor was turned down when applying for welfare. We therefore conclude the trial court properly found the supervisor's comments to be insufficient as a matter of law to sustain plaintiffs' claim of reverse discrimination.

The remainder of the incidents plaintiffs allege in their complaint fail to meet the requirements of reverse discrimination set forth in *Wilcoxon*, *supra*. Plaintiffs' complaint that co-workers did not return to work to assist them to finish waxing the floor and plaintiffs' complaint that they were required to complete a job in two hours as opposed to other workers allegedly taking eight hours do not establish adverse employment actions against plaintiffs. Plaintiffs suffered no economic harm as a result of this alleged wrongful conduct. Courts have no authority under the Civil Rights Act to police employee productivity or insure that employers efficiently manage their workforce. An adverse employment action will only be found where there is a significant change in employment status, such as "firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc v Ellerth*, 524 US 742, 761; 118 S Ct 2257; 141L Ed 2d 633 (1998). Where, as here, the alleged wrongful conduct does not impact the economic status or employment standing of the employee, we cannot review an employer's management style in search of an adverse employment action.

Plaintiff, George Kupel, also argues that his claim of discrimination is supported by the fact that he was wrongfully disciplined for not cleaning a restroom. However, this isolated disciplinary action is insufficient to sustain plaintiffs' claim of reverse discrimination as a matter of law. An isolated act by an employer that is subsequently remedied by a grievance process does not amount to an adverse employment action under the Civil Rights Act. See *Dobbs-Weinstein v Vanderbilt Univ*, 185 F 3d 542 (CA 6, 1999). "To rule otherwise would encourage litigation before an employer has an opportunity to correct through internal grievance procedures any wrong it may have committed." *Id*. at 546. Plaintiff prevailed on his grievance and his lost pay was fully recovered. Therefore, plaintiff suffered no adverse economic consequence from defendant's act of improvidently imposing discipline upon plaintiff.

Additionally, plaintiffs argue that, according to the daily overtime sheets, they were discriminated against because they were denied equal overtime. However, the daily overtime sheets did not reveal which employees had work restrictions. Plaintiff Marianne Kupel had medical restrictions that limited the type of overtime jobs she could perform. Therefore, plaintiff MaryAnn Kupel failed to establish that she was similarly situated to non-protected persons who were assigned overtime. Plaintiff George Krupel's claim based on the denial of overtime fares no better. Were we to assume that he established a prima facie claim relating to the denial of overtime, he nonetheless failed to overcome the legitimate non-discriminatory reason offered by defendant to support the overtime assignments. Defendant maintained overtime was assigned on the basis of employee expertise. Pretext may be established by demonstrating that consideration of a protected characteristic was a motivating factor and made a difference in the contested employment decision. *Hazle v Ford Motor Co*, 464 Mich 456, 462-467; 628 NW2d 515 (2000). However, the soundness of the employer's business judgment may not be scrutinized as a means of showing pretext. *Meager v Wayne State Univ*, 222 Mich App 700; 565 NW2d 401 (1997). Plaintiffs argue the merits of defendant's business judgment and fail to present evidence that would support the conclusion that defendant's proffered method of assigning overtime is pretextual.

B. Retaliation Claim Pursuant to the Michigan Civil Rights Act

In *Meyer v City of Center Line*, 242 Mich App 560; 619 NW2d 182 (2000), this Court noted that to establish a prima facie case of retaliation under the Civil Rights Act, a plaintiff must show (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Id.* at 568-569. An adverse employment action (1) must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff. *Id.*

Here, plaintiffs have failed to present sufficient evidence to support their retaliation claim. As discussed previously, plaintiffs could not show that they were subjected to any adverse employment actions. Any actions taken against plaintiffs were no more than mere inconveniences or alterations of job responsibilities. Plaintiffs argue that Liz Howard, plaintiffs' supervisor, wrote up plaintiff George Kupel after he and his wife left early for lunch to make complaints to the General Motors Labor Relations Department. However, plaintiff George Kupel admitted in his deposition that Howard saw plaintiffs leaving early for lunch without permission, and that they were supposed to ask permission from their supervisor to leave early. The trial court determined that plaintiffs were written up not because they were going to make a complaint, but because they left early without permission. While it is evident there was a certain amount of on the job tension and employment conflict between and among plaintiffs and their supervisors, this conduct does not meet the threshold of a retaliation claim under the Michigan Civil Rights Act. We find that the trial court did not err in granting summary disposition on plaintiffs' retaliation claim.

C. Hostile Work Environment Claim Pursuant to the Michigan Civil Rights Act

A hostile work environment claim is actionable if plaintiffs establish: (1) they belonged to a protected group; (2) they were subjected to unwelcome conduct on the basis of their protected status; (3) the unwelcome conduct was intended to interfere with plaintiffs' employment or to create an intimidating, hostile or offensive work environment; and (4) respondeat superior. *Radtke v Everett*, 442 Mich 368, 372; 501 NW2d 155 (1993). Plaintiffs failed to establish the second and third elements identified above.

Plaintiff contends that the comment "watch your back" from co-worker Rick Jones created an atmosphere "of danger and hostility." Aside from the alleged threat that plaintiff, George Kupel, was told to "watch his back," plaintiffs failed to establish evidence of a hostile or intimidating environment. Plaintiffs worked with Jones the remainder of the shift and testified that they did not have any problems after that one incident. Additionally, plaintiff George Kupel apparently did not feel the need to call security because of Jones' remark. Further, Jones allegedly made this comment because of a dispute over whether George Kupel should have assisted Jones in completing his work duties. Thus, there is no evidence the comment was a result of George Kupel's status as a Caucasian of eastern European descent. The trial court did not err in granting summary disposition on plaintiffs' hostile environment claim.

D. Case Evaluation Award

Plaintiffs also argue that the trial court abused its discretion by refusing to reinstate defendant, Mary Ann Hergt, after plaintiffs inadvertently accepted a "zero" case evaluation award against her in the course of accepting monetary awards against each of the other defendants. We need not address this issue, because we conclude the trial court properly dismissed plaintiffs' claims pursuant to MCR 2.116(C)(10). Were we to conclude the trial court abused its discretion by failing to set aside plaintiffs' acceptance of the mediation evaluation[3] as to defendant Hergt, she would nonetheless be entitled to summary disposition for the reasons supporting summary disposition in favor of defendant General Motors.

IV. Conclusion

In summary, plaintiff failed to establish claims under the Michigan Civil Rights Act for reverse discrimination, retaliation, or hostile work environment.

Affirmed.

/s/ Brian K. Zahra
/s/ Bill Schuette

[3] Pursuant to MCR 2.403, the mediation process is now referred to as case evaluation.